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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 320

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

FRANK G. SCHLOSSER,
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Petitioner prays that a writ of certiorari issue to review the judgment (R. 47) of the Supreme Court of the State of New Jersey filed June 27, 1950, mandate (R. 47) issued July 6, 1950, which mandate affirmed a judgment (R. 21) of the Superior Court, Appellate Division, dismissing petitioner's constitutional appeal from an order (R. 16) of the Law Division of the same court. The order appealed from summary dismissed petitioner's suit to expunge a grand jury libel (R. 2-15) upon him from the files of court, which libel was published in violation of petitioner's rights under Amendments V and XIV to the Constitution of the United States (R. 1) and under the Constitution of the State of New Jersey (R. 1).

Opinions Below

The opinion of the Supreme Court of New Jersey (R. 23) is reported in 5 N. J. 240. That of the Appellate Division (R. 18) is reported in 5 N. J. Super. 30.

Jurisdiction

The Supreme Court of New Jersey is the highest court of the State. Its judgment was entered *nisi* on June 27, 1950, and mandate on affirmance (R. 47) was issued July 6, 1950. This Petition is filed September 20, 1950.

The jurisdiction of this court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. s. 1257, authorizing review of final judgments rendered in the highest court of a State by writ of certiorari where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, &c., of the United States, or where any title, right, privilege or immunity under the Constitution, &c., is specially set up or claimed.

Questions Presented

1. Whether the New Jersey appellate courts denied due process of law to petitioner by invoking against him a new 45-day appeal court rule, never before construed, in the face of a long-standing unrepealed 1-year appeal statute when, at the time petitioner took his appeal, statute and rule were in conflict, no court decision resolving the conflict existed, and the appeal was taken 61 days after adverse judgment and 44 days after amendment of that judgment.

2. Whether state appellate courts can constitutionally use a litigant as a guinea pig and invoke against him a new legal doctrine, never before promulgated, and on the basis of such new doctrine applied ex post facto deprive him of his right to an appeal given him by the state Constitution.

3. Whether, in view of the constitutional command that the "United States shall guarantee to every State in this Union a Republican Form of Government" (Art. IV, Sec. 4 of the federal Constitution), an appointive state court of last resort can constitutionally oust an elected legislature from jurisdiction over matters of practice and procedure, thus upsetting the system of constitutional checks and balances inherent in a republic and leaving the people (who have no voice in selection of the judges) helpless to effect change.

Statement

JOHN J. WINBERRY (hereinafter sometimes called the petitioner) suffered dismissal of his state constitutional appeal from an adverse trial court decision. The appeal was dismissed under a ruling that a new 45-day appeal rule adopted by the State Supreme Court had repealed or superseded a 1-year appeal statute of long standing, although the new rule of court did not expressly repeal the statute and no one in New Jersey ever had notice of such asserted repeal. The new doctrine was first invoked against petitioner, without prior notice to him or anyone else that the Judicial Branch of the state government had or even claimed to have supremacy over the Legislative Branch under the new state Constitution adopted in 1947 or that the new 45-day appeal rule applied in the face of the 1-year statute of long standing.

Statute and rule are in conflict and the rule did not attempt to repeal the statute. Winberry relied upon the statute and appealed 61 days after judgment, and 44 days after the trial court had amended that judgment. His appeal was taken within time under the statute, but was held out of time under the court rule. In this there was a denial of due process of law arising out of lack of notice to petitioner that he must take his constitutional appeal within the 45 days prescribed by court rule and not the 1 year allowed by statute.

Assuming that future litigants will have notice from the decision in this cause that they must exercise within 45 days the right of appeal granted by the new state Constitution, Winberry had no such notice. He was the legal guinea pig whose case made the law, a law of which he learned for the first time after it came too late to guide him. He did not receive due process under the law of the land which notifies before it hears and condemns no one unheard.

Winberry was a deputy New Jersey attorney general, and a public prosecutor attempting to stamp out organized gambling in Middlesex County, New Jersey. In April, 1947, Supreme Court Justice Frederic R. Colie had nominated him for the appointment and Attorney General Walter D. Van Riper had reluctantly acceded to the wishes of Mr. Justice Colie (R. 3) and made the appointment. Winberry's special assignment was to assist in the conduct of the criminal business of Middlesex County with regard to gambling and its ramifications (R. 3) because of the breakdown of effective law enforcement in that county (R. 15).

Winberry's relations with Attorney General Van Riper were strained. A Democrat, his appointment was not relished by Van Riper, a powerful Republican. Mr. Van Riper did not like to give Republican patronage to a Democrat, but give it he had to on the request of Mr. Justice Colie, himself also a Republican, who wanted a man he could trust and found that man in Winberry. The strain was increased when Winberry reported to the Justice and not Van Riper, whereafter Van Riper began to withhold payment of the Winberry investigation bills (R. 9-10) thus crippling the deputy attorney general.

In November, 1948, Van Riper fired Winberry. At this time Mr. Justice Colie was out of the way, having been assigned to a different court when the new state Constitution went into complete operation on September 15, 1948. Winberry was adroitly goaded into accusing Van Riper of

sabotage and then the Attorney General summarily dismissed him, ending the investigation just as Winberry was about to move against the heads of the gambling syndicate in Middlesex County.

The gamblers thus escaped, but the matter did not end there. At that time Attorney General Van Riper held enormous powers, by reason of his office. No judge in the state could be appointed without Van Riper's clearance; no public prosecutor could act if Van Riper, on the governor's request, decided to move into any of the 21 counties of New Jersey; the entire force of the State Police was his to command and use, when and how he wanted to use them. Winberry had not challenged a windmill, like Quixote, but an armored knight and a private army. His punishment was one of public defamation, administered through the county grand jury, under circumstances now to be related.

After his dismissal by Attorney General Van Riper, Winberry made a written report to Judge Colie (R. 4). In it he said (among other things): "It is a deplorable circumstance, but true that I had obtained very vital evidence just forty-eight hours before the Attorney General saw fit to order my dismissal" (R. 5). Thereupon Van Riper sent a new deputy before the Middlesex Grand Jury, had the charges tried in camera behind the closed door of the jury room, and was exonerated of wrongdoing while Winberry was smeared in public by an extraordinary "presentment" signed, filed and made public as a court record by Salisbury as foreman of the jury (R. 2-15).

The presentment, covering 15 pages in the printed record (R. 2-15), is an elaborate document, far beyond the abilities of ordinary grand jurors to produce, painstakingly prepared by some anonymous person (evidently a skillful, highly trained lawyer). It libels Winberry and acquits Van Riper. Published, as it was, in the state-wide press the

libel defamed Winberry. In carefully chosen words Winberry was branded, in effect, as a pathological liar. It was said, through Foreman Salisbury, that Winberry's conduct had indicated "an irresponsibility requiring censure" (R. 9) and that someone (meaning Winberry) had made statements "in such utter disregard of anything evidencing their truth as to indicate on the part of the author malice and reprehensible conduct" (R. 14).

Such a presentment is not an indictment, not being intended as such. It is used in New Jersey (and some other states) as a shield against libel suits.

The grand jury cannot be sued civilly for libel, but a libellous presentment may be expunged. *O'Regan* v. *Schermerhorn,* N. J. Sup. 1946, 25 N. J. Misc. 1, 31. Accordingly Winberry filed suit to expunge (R. 1-15) but his action was summarily dismissed (R. 16). The dismissal was affirmed on appeal on a holding that the new 45-day appeal rule took precedence over the long-standing 1-year appeal statute, although until the New Jersey appellate courts announced the new doctrine in Winberry's appeal the statute expressed the public policy of New Jersey and was the law of the State.

In New Jersey the Legislative and Judicial Branches are engaged in a constitutional struggle and Winberry is the unwilling victim of that strife. With statute and rule in hopeless conflict he has been made to guess at their meanings and differ as to their application, and has been held responsible for guessing wrong notwithstanding lack of any standard to assist him in correctly resolving the conflict. With two legislatures in the State (the Senate and House of Assembly being one and the Supreme Court the other) Winberry at his peril had to decide for himself which legislature's acts were supreme, upon pain of losing his constitutional right to an appeal if he were wrong. Such a condition

of state affairs amounts to a denial of due process when it is sought to visit upon the litigant a penalty for wrong-guessing at a time when guessing alone was possible.

The Conflict in New Jersey

In November, 1947, the people of New Jersey adopted a new Constitution to supersede the 1844 Constitution. The new charter went into effect January 1, 1948, except for the Judicial Article which became operative September 15, 1948.

The 1947 constitution abolished the old judicial system and created a new one headed by the Supreme Court of New Jersey, upon which court was conferred the rule-making power in these words: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." N. J. Const. 1947, Art. VI, Section II, Para. 3.

In the Constitutional Convention held at New Brunswick in the Summer of 1947 it was the intention to confer upon the new Supreme Court a power to administer all courts in the State without legislative interference and a power to make rules governing practice and procedure subject to the will of the people as expressed by their elected representatives in the Legislature. This intent was expressed in constitutional language by making the rule-making power "subject to law". The meaning of that restrictive phrase is not in doubt. It is plainly set forth in the Report of the Committee on the Judiciary, Constitutional Convention 1947, annotating the rule-making power as follows: "Sec. II, Par. 3. Responsibility for administration, practice and procedure in all the courts of the State is vested in the Supreme Court, but the Legislature may revise or repeal the rules of practice and procedure, or initiate new provisions on the subject. * * *" *Report of the Committee*

on the Judiciary, August 26, 1947, at p. 17. The convention did not adopt the proposed new Constitution until September 10, at which time the Report was before the delegates and necessarily influenced their votes. That same Report was before the people on election day in 1947 when, at a referendum, they adopted the new Constitution and were necessarily influenced in so doing by the Report. At no time were delegates or voters ever informed that adoption of the new charter would result in the people of New Jersey losing all control over life, liberty and property as affected by rules of practice enacted by the Supreme Court of New Jersey, nor did they ever intend to erect two legislatures, each independent of the other within their respective spheres.

It is not likely that a free people would voluntarily deliver themselves and their children and their children's children over to an appointive court over which they had no control. With an elective judiciary the situation might be altered but the New Jersey judges being appointed by the Governor and confirmed by majority vote of the State Senate, elected one for each of the 21 counties of the State, the people have no voice in their appointment and no control over them, especially when after one reappointment each judge has tenure of office for life or until attaining the retirement age of 70 years. No people can be free in such a situation but must submit to the rules of the judiciary which rules, however well intended, amount in effect to government without the consent of the governed.

The constitutional conflict in New Jersey did not develop until the Legislature refused to put the new court rules into operation without legislative change in 1948. In the beginning a spirit of cooperation prevailed among the three branches of government, but this spirit evaporated in the Legislative Branch in the course of events now about to be related.

The members of the new 7-judge Supreme Court were appointed and confirmed in advance of September 15, 1948, when the Judicial Article of the new Constitution went into operation. After their appointment the judges-designate of the Supreme Court set in motion rule-making machinery in order to obtain sound rules and a simple system of civil and criminal practice. The model used was the federal rules, upon which the court-to-be caused a tentative draft to be prepared and submitted to bench, bar and citizens of New Jersey. Criticism and advice were sought and given, whereafter a final draft of the new rules was prepared under date of June 21, 1948, effective upon the birth of the new judicial system on September 15, 1948. Thereupon the Legislature spent a good part of that Summer enacting legislation designed to implement the constitutional provisions setting up the new judicial system.

It soon became apparent that the Legislature would not approve the new rules without change. On August 23, 1948, Senator Hannold introduced into the State Senate a bill known as Senate 58. This bill provided that the new rules promulgated by the Supreme Court to take effect September 15, 1948, "shall govern the practice and procedure in said courts and before the Surrogates, except as otherwise provided in this act, and the said Rules shall supersede (so far as they conflict with) statutory and common law practice and procedural regulations heretofore existing." In Senate 58 the Legislature made a few changes in the proposed rules and the bill, after passing both houses, was vetoed by Governor Driscoll on October 30, 1948, six weeks after the effective date of the rules.

After the veto of Senate 58 the new rules stood (and remain) without legislative support and in many instances conflicted with the statutes of New Jersey. At this juncture the Supreme Court could have attempted to resolve the con-

flict or could have announced to the people that the rules stood and in standing superseded prior conflicting legislation. The court did neither, thus leaving everyone in doubt. If the court had given notice that its rules governed to the exclusion of existing conflicting statutes Winberry could have been guided thereby and appealed or not within the 45-day rule, instead of relying upon the 1-year appeal statute and spending his money on a fruitless appeal. The dilemma was no fault of his but it resulted for him in denial of due process when the Supreme Court announced the doctrine that it was supreme and made that announcement for the first time to Winberry in his own appeal. This is equivalent to condemning without prior notice, the direct opposite of the law of the land, and as such is a denial of due process.

Reasons for Granting Certiorari

While an appeal is not an indispensable element of due process, yet on the principles adopted in *Frank* v. *Mangum*, U. S. Sup. 1915, 237 U. S. 309, 327, where the state provides an appeal the proceedings thereon are part of the process of law and are to be considered in determining any question of alleged deprivation of due process. Lack of due process in a state-provided appeal is just as fatal as the same lack in a trial court. If this were not so the right to appeal would be a mockery. Appellate procedure is guided by the overriding principles of due process: litigants must receive reasonable notice of time allowed for appeal; such notice may be given by statute or rule and will suffice when the litigant is not left in doubt, but when the notice necessarily arises out of enactments so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application it amounts to no notice at all and thus violates the first essential of due process of law. That is the case here where, with statute and rule in

conflict, the appellant could not know, under conditions as they then stood, within what time he had either to appeal or submit to the adverse judgment.

By constitutional grant in New Jersey every litigant has the right to one appeal. N. J. Const. 1947, Art. VI, Section V, Paragraphs 1, 2, and 3. The constitution is silent upon time for appeal, thus impliedly authorizing legislation upon that subject, but existing laws were to continue: "All law, statutory and otherwise, all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise." N. J. Const. 1947, Art. XI, Sec. 1, Para. 3.

Under the Constitution R. S. 2:27-356, giving 1 year for appeal in civil cases, was to continue and remain in full force until expiration or until superseded, altered or repealed. If the Constitution had intended to permit the Judicial Branch to repeal longstanding statutes by court rule it would and should have said so. Moreover, the court in adopting the rules—if it then claimed the power it later asserted in this very case—would have and should have included such a repealer. It did not do so. Such a startling omission is strong evidence that the court did not (in 1948) claim paramountcy over the Legislature, and made that claim in 1950 (in the words of Mr. Justice Case) because it desired "to save the body of rules which, with care and labor, has been built up during the past two and a half years from being scuttled * * *" (R. 45).

The spirit behind the new court rules in New Jersey is laudable, but their invocation against Winberry ex post facto denies him that due process of law guaranteed by the Fourteenth Amendment. Such denial caused him to lose the liberty of enjoying a good reputation; it also caused him to lose his property, i. e., the money he has had to pay

to the printers for setting up the trial court record for use on his appeal, which record became utterly worthless when the appellate courts of New Jersey refused to hear that appeal. The type had to be pied and Winberry had to pay for the labor of original printing composition which had progressed as far as page proofs before notice of motion to dismiss his appeal was served upon him. If the laws of New Jersey had not been vague, as they were, this loss would not have occurred. His appeal, taken in good faith and in reliance upon an unrepealed statute without any notice that the new 45-day court rule governed, should have been heard on the merits. Instead he became the legal guinea pig, but while such an animal is helpless Winberry is clothed with protection of the Fourteenth Amendment which forbids use of litigants for the announcement of new doctrines of law.

It is an elementary principle of constitutional law that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; cf. *Winters* v. *New York*, 333 U. S. 507, 515. While that constitutional principle is ordinarily invoked in the criminal law it is just as valid in civil law.

When the law of a State is so vague, as it was in New Jersey until this very case was decided by the state court of last resort, that men had to guess and differ over it, due process of law is absent. It is indeed rare for such a situation to arise, but it has arisen in New Jersey. The court made the law on June 27, 1950, when its decision (R. 23) was announced, and applied it to Winberry retroactively and ex post facto by a vote of 6-1 on dismissal and by a vote of 5-1

on the validity of its new doctrine of court supremacy (R. 22). Until then no one knew or could have known what the law was. How can Winberry constitutionally lose his rights for failure to guess correctly, when the court never announced the law until deciding his case?

Moreover, we think that the doctrine of judicial supremacy over the Legislature in matters of practice and procedure, announced now for the first time by the state court of last resort in petitioner's appeal, conflicts with the guaranty of a republican form of government given in Article IV, Section 4 of the Constitution of the United States. That guaranty means that the people of New Jersey will live under a form of government responsive to the popular will and that petitioner, as a citizen of New Jersey, will live in the same manner. If force must be employed to carry out that guaranty the political power of the federal government will be used but where, as here, no force is required the Judicial Department will enforce the right.

To be republican in form a state government requires something more than mere absence of a monarchy or dictatorship—there must also exist a real division of powers among at least three branches of government: legislative, executive and judicial; and the state government must derive its just powers from the consent of the governed.

When the new Constitution was drafted in convention at New Brunswick in 1947 the new government was republican in form, with powers divided among three branches, each expressly forbidden to exercise any of the powers properly belonging to either of the others, except as expressly provided in the Constitution. N. J. Const. 1947, Article III, Para. 1. That Constitution did not expressly confer any final legislative power upon the Supreme Court of New Jersey, but only a rule-making power carefully limited so as to be "subject to law." The phrase "subject to law" was employed to allow the Legislature to con-

trol the court's exercise of power over the lives, liberties and property of the people, for the elected Legislature is responsive to the people's will while the appointed judges are not. Moreover, when the convention delegates and the people adopted the new Constitution they had before them the Report of the Committee on the Judiciary, which report expressly stated that the Legislature may revise or repeal the rules of court. Now that the court has decided that it has paramountcy over the Legislature, notwithstanding that Report, the result is that there exist in New Jersey two legislatures, one responsive to the people and the other not responsive. Such a condition denies a republican form of government to the almost 5 million people of New Jersey, including petitioner, who will lose life or liberty or property, or all three, under court rules imposed without legislative support and without the consent of the governed.

Assuming the right of the Supreme Court of New Jersey to interpret with finality the meaning of the New Jersey Constitution, nevertheless when the interpretation results in denial of a republican form of government the matter becomes one for final interpretation by the Supreme Court of the United States, within whose exclusive province lies the interpretation of the Constitution of the United States.

When, as construed by a state court of last resort, a state Constitution contravenes the United States Constitution the people of the State must turn to the Supreme Court of the United States for relief. They have no other redress. As one of the people of New Jersey petitioner has both right and duty to appeal to this court under the extraordinary circumstances of this case.

The opinions below were delivered by two of New Jersey's greatest lawyers. The prevailing opinion (R. 23-35) by Mr. Chief Justice Vanderbilt attracted 4 votes in addition to his own. That of Mr. Justice Case, lately Chief Justice of the former Supreme Court, denies the court's power to leg-

islate with finality (R. 35-46). Mr. Justice Heher voted for petitioner against dismissal and did not take a position on the court's power. Thus the court was not unanimous and on the constitutional question the vote was 5-1 (R. 22), with former Chief Justice Case in a carefully reasoned opinion denying the court's power and saying much in little when he wrote: "The desire, I take it, is to save the body of rules * * * from being scuttled" (R. 45).

In the federal system the court of last resort is empowered to make rules, but that power was granted by an elected Congress and is subject to the people's will. No one can complain of such a matter, for the federal rules exist with the consent of the governed and can be altered by the people of the United States, if necessary, through their elected senators and representatives. In New Jersey the people have lost their power to change, and it is this loss which denies them a republican form of government.

It is right that the Judicial Branch should have rule-making power, so long as the people may make changes if necessary. It is wrong, however, for the judiciary, living apart from the people as they must, to have that power free of the people's will. To the extent that our court may legislate we, our children, and our children's children will be governed without consent, our Legislature will be ousted of jurisdiction over important matters of public policy, and a republican form of government will not exist in New Jersey. It is theoretically true that we may amend our Constitution, but the task would be difficult in the extreme and must result in defeat for us if the opponents of change could muster 11 votes in the State Senate to which each county, regardless of population, elects one member. In our Senate, selected on an acreage basis instead of population, a rural senator whose county contains more cows than people has the same vote as the senator from Essex which contains

almost a million inhabitants. Moreover, since our people never intended to surrender sovereignty to the Judicial Branch they ought not to be compelled to endure the present situation in New Jersey unless and until they can amend their Constitution, for that Constitution was never intended to give the court the power it has now decided it possesses.

The danger inherent in the present constitutional conflict in New Jersey, with court and Legislature still at odds, is intensified by the undoubted high purpose of the present members of the New Jersey court of last resort. Their honesty of purpose and purity of intention are not open to question, for which reason it is often said that their rules, being intended for the public good, should be accepted and that any one who questions the wisdom of an unrestrained rule-making power is impliedly impugning the integrity of the judges. A bad means will not, however, justify a good end and the Constitution of the United States cannot be lightly set aside simply because present exercise of the rule-making power is beyond reproach. The Bench will change over the years. What assurance have the people of New Jersey that other judges, all free of popular control, will not offend? Constitutions exist because a people cannot repose its entire trust in men.

A free people must retain control, for the Judicial Branch not being elected by popular ballot no other practicable restraint is possible. The lives, the liberties, and the property of the people are jeopardized by rules of court, for which reason the people of New Jersey must have control over them, if necessary to correct them, if they are to have a republican form of government.

The 150 million people of the United States are vitally interested in the outcome of this case, for if the New Jersey result is not altered by this court it is not unlikely that

many of the 48 states may be led to follow the example, leaving millions of people beyond the borders of New Jersey similarly deprived of a republican form of government and governed, without their consent, by an appointive judiciary.

When the guaranty of a republican form of government was inserted in the Constitution, some thought it to be a needless precaution. "But," wrote Madison, "who can say what experiments may be produced by the caprice of various states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?" While the guaranty goes to the states, it necessarily follows that it also goes to the people of the states and through them to the petitioner as a citizen of New Jersey.

To be republican in form the State of New Jersey must maintain a government which derives all its powers from the people. At the present time the State does not do that, for the Judicial Branch of the state government legislates with finality upon legal subjects of enormous scope and does so without the approval of the Legislature and without the expressed consent of the people. "Practice and procedure" deals with matters of great moment; right to trial by jury in cases not covered by the Constitution; time for appeal; deposits for costs—in fact every part of criminal and civil law not embraced by the substantive law, all now lost to the people of New Jersey and with the full extent of their loss not measurable for generations. When such a condition arises out of a decision of a state court interpreting its own powers, this court must act to examine into the matter and correct the evil if necessary to restore to New Jersey a government republican in form.

In the present cause we think a proper showing has been made under the Act of June 25, 1948, c. 646, 62 Stat. 929, for review. Rule 1:2-5(b) of the Supreme Court of New Jersey

allows 45 days for appeal and has the force and effect of a statute, the validity of which is drawn in question on the ground of its being repugnant to the Constitution of the United States. Moreover, in his complaint (R. 1) petitioner specially set up and claimed the protection of Amendments V and XIV of the Constitution of the United States, and the dismissal of his appeal under the extraordinary circumstances of this case not only deprives him of due process of law but also prevents his receiving the rights, privileges and immunities given to him under the Constitution as specially set up and claimed. In addition he has the right to live under a republican form of government and only this court can enforce that right.

The petitioner therefore respectfully submits that his petition for a writ of certiorari to the Supreme Court of New Jersey should be granted.

FRANK G. SCHLOSSER,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 320.

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 320.

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This petition for certiorari seeks to review the judgment of the Supreme Court of New Jersey affirming a judgment of the Superior Court of New Jersey, Appellate Division, which dismissed an appeal taken by petitioner from a judgment of the trial court (Superior Court of New Jersey, Law Division, Middlesex County) on the ground that the appeal to the Superior Court of New Jersey Appellate Division had not been taken within time.

On February 18, 1949, the petitioner herein filed a complaint in a civil action (R. 1) in the Superior Court of New Jersey, Law Division, Middlesex County (hereinafter called the trial court), demanding that a presentment (R. 2–15),

filed by the Middlesex County Grand Jury be expunged from the files of the County Clerk of Middlesex County, New Jersey.

A motion for summary judgment addressed to the complaint was made by respondent herein upon the ground, inter alia, that the complaint did not state a cause of action on which petitioner herein was entitled to any relief. The petitioner made a cross motion for a summary judgment in his favor. The motion of respondent was granted and that of the petitioner denied. On May 25, 1949, the trial court ordered that summary judgment be entered for respondent herein and against the petitioner and dismissed the complaint (R. 16).

On June 14, 1949, an order was entered by the trial court that the aforesaid summary judgment should be without costs. This order was entered upon the grounds that the summary judgment of May 25, 1949, by inadvertance, had failed to provide that it should be without costs. It was entered by consent of all parties and such consent was endorsed thereon (R. 16–17).

On July 26, 1949, a notice of appeal to the Superior Court of New Jersey, Appellate Division, was served by petitioner and acknowledged by the attorney for respondent herein (R. 17). The acknowledgment of service specifically stated that it was without prejudice to the claim that the same was out of time (R. 17).

The notice of appeal was served sixty-one days after entry of the summary judgment and forty-one days after entry of the consent order that the summary judgment should be without costs. The rules governing the courts of the State of New Jersey provide that an appeal from the Superior Court in civil causes must be taken to the appropriate appellate court within forty-five days after entry of the judgment appealed from. The pertinent part of the Supreme Court rule applicable reads as follows:

> "R. 1:2–5. Time of Appeal.
>
> "Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after the entry of the judgment, order or determination appealed from:
>
> "(b) Final judgments of the county courts, or trial divisions of the Superior Court, in civil causes, forty-five days, and in criminal causes, six months, unless a shorter time is provided by law."

The above quoted rule is made applicable to appeals to the Appellate Division of the Superior Court of New Jersey by Rule 4:2–5 which reads as follows:

> "Where an appeal is permitted to this court, it shall be taken within the appropriate time provided for in Rule 1:2–5."

A motion was made to dismiss the appeal taken to the Superior Court of New Jersey, Appellate Division, from the judgment of the trial court upon the grounds that the same was not taken within the time required (R. 17). This motion was argued before the Appellate Division of the Superior Court of New Jersey on August 23, 1949, and on September 14, 1949, the said Appellate Division in its opinion dismissed the appeal upon the ground that it was not taken within time (R. 18–21). Judgment was entered dismissing said appeal (R. 21). An appeal from this judgment of the Appellate Division dismissing the appeal was taken to the Supreme Court of New Jersey (R. 21–22). On June 27, 1950, the Supreme Court in its opinion affirmed the judgment of the Appellate Division of the Superior Court which dismissed the appeal from the judgment of the trial court (R. 23–46). Mandate on affirmance in the Supreme Court was filed June 27, 1950 (R. 47).

The only question presented to the Appellate Division of the Superior Court and to the Supreme Court of New Jersey

on both appeals was whether the appeal from the judgment of the trial court to the Appellate Division was taken within time. The respondent herein claimed that the rule previously quoted required an appeal from the trial court to be taken to the Appellate Division of the Superior Court of New Jersey within forty-five days from the time of the entry of the judgment.

The petitioner herein resisted the motion upon the grounds that he had taken his appeal within the time required by the rules, and in any event, the petitioner claimed that the statute (R. S. 2:27–356) gave him a year within which to take an appeal. The pertinent part of this statute provides as follows:

> "R. S. 2:27–356. No appeal shall be taken in any case unless the same shall be taken within one year after judgment rendered, * * *."

The question then arose whether the summary judgment entered on May 25, 1949, was the final judgment from which appeal had to be taken or whether the order entered June 14, 1949, providing that the judgment should be without costs was the final judgment from which appeal could be taken. It was decided by the Appellate Division of the Superior Court (R. 18–21) and also the Supreme Court of New Jersey (R. 23–46) that the summary judgment entered May 25, 1949, was the final judgment from which the appeal must be taken.

The question then arose whether the time within which to take an appeal specified in the rule previously quoted was applicable or whether the time specified in the statute previously quoted applied. The Appellate Division of the Superior Court (R. 18–21) and the Supreme Court of New Jersey (R. 23–46) held that the rule of the Court superseded the statute in question under the provisions of Article VI, Section 2, paragraph 3 of the Constitution of 1947 of New

Jersey. The sole question argued and involved in the appeal to the Appellate Division of the Superior Court and the further appeal to the Supreme Court of New Jersey was as to the construction of the rule and the statute and whether the rule superseded the statute. No Federal question was raised or argued in either the Appellate Division of the Superior Court or the Supreme Court of New Jersey. A mere question of construction under the Constitution of 1947 of the State of New Jersey was the only question presented.

This petition for a writ of certiorari herein is directed to a review of the judgment of the Supreme Court of New Jersey affirming the judgment of the Appellate Division of the Superior Court of New Jersey dismissing the appeal from the judgment of the trial court. Federal questions are raised for the first time in this proceeding.

Questions Presented.

1. Whether this Court has jurisdiction in the premises.
2. Whether Federal questions may be raised for the first time upon a petition for a writ of certiorari to the United States Supreme Court.
3. Whether a writ of certiorari should issue.

Reasons for Denying the Writ.

The basis for this petition for writ of certiorari is that the Supreme Court of New Jersey erred in affirming the judgment of the Appellate Division of the Superior Court of New Jersey which dismissed an appeal from a final judgment of the trial court upon the ground that the appeal was not taken within time. The writ should be denied upon the following grounds:

1. This court is without jurisdiction because no Federal question was raised in the State courts. The petitioner claims that he was denied due process of law and was deprived of his right to appeal given him by the State Constitution, and further, that Article IV, Section IV of the United States Constitution, which guarantees to every State a republican form of government, has been violated. These claims which the petitioner now makes were not raised in the courts of New Jersey, nor did the State Court pass upon them. The first time any Federal question has been raised is on this petition in this Court, and consequently, jurisdiction of this Court is lacking under 28 U. S. C. A. 1257.

2. No Federal question actually is involved herein. The petitioner failed to take his appeal within the time limited and now seeks to avoid the result of such failure by claiming he was denied due process of law and deprived of his right to appeal and that the republican form of government has been denied to New Jersey. The right to appeal is a procedural matter and may only be perfected by taking the steps necessary. The failure to do so constitutes a waiver of his right to appeal and does not constitute a deprivation of any vested right. The contention that Article IV, Section IV of the United States Constitution was violated is a political and not a judicial question.

ARGUMENT.

POINT I.

The petition should be denied because of lack of jurisdiction in this Court.

The issue in this case is limited to the question of the dismissal of the appeal in the Appellate Division of the Superior Court of New Jersey upon procedural grounds, to wit, that it was not taken within time. Any Federal question

for jurisdictional purposes in this Court would be raised only in the Appellate Division of the Superior Court or in the Supreme Court of New Jersey. Any Federal question raised by the complaint in the trial court with respect to the merits of the complaint would not be the proper subject for argument before the appellate courts on a motion to dismiss an appeal as not being taken within the time required. Consequently, the Federal questions raised in the complaint filed in the trial court are not before this Court on this petition and may not be made the basis for jurisdictional purposes in this Court.

The petitioner, under 28 U. S. C. A. 1257, is required to raise the Federal question in one or both of the Appellate Courts of the State of New Jersey.

House vs. *Road Improvement Dist. &c,* 266 U. S. 175, 45 S. Ct. 60.
Waters-Pierce Oil Co. vs. *Texas,* 212 U. S. 86, 29 S. Ct. 220.
Adams vs. *Russell,* 229 U. S. 353, 33 S. Ct. 846.
Murdock vs. *Memphis,* 20 Wall. 590, 22 L. ed. 429.
Levy vs. *San Francisco Superior Ct.,* 167 U. S. 175, 17 S. Ct. 769.
Scudder vs. *New York,* 175 U. S. 32, 20 S. Ct. 26.
People of New York ex rel. Rosevale Realty Co. vs. *Kleinert,* 268 U. S. 646, 45 S. Ct. 618.
Montana vs. *Rice,* 204 U. S. 291, 27 S. Ct. 281.
Missouri Pac. R. Co. vs. *Taber,* 244 U. S. 200, 37 S. Ct. 522.

A Federal question for jurisdictional purposes is not raised in time when it is raised for the first time upon a petition for a writ of certiorari in this Court.

Rogers vs. *Clark Iron Co.,* 217 U. S. 589, 30 S. Ct. 693.
Mallers vs. *Commercial Loan Co.,* 216 U. S. 613, 30 S. Ct. 438.
Meyer vs. *Richmond,* 172 U. S. 82, 19 S. Ct. 106.

Johnson vs. *N. Y. Life Ins. Co.,* 187 U. S. 491, 23 S. Ct. 194.

Telluride Power Transmission Co. vs. *Rio Grande Western R. Co.,* 187 U. S. 569, 23 S. Ct. 178.

It is necessary that the Federal question relied upon to confer jurisdiction in this Court be presented for decision at some time during the proceedings before the State Courts. *Murdock* vs. *Memphis,* 20 Wall. 590, 22 L. ed. 429; *Mutual Life Ins.* vs. *McGrew,* 188 U. S. 291, 23 S. Ct. 375; *Sayward* vs. *Denny,* 158 U. S. 180, 15 S. Ct. 777.

The proceedings out of which this petition for a writ of certiorari arises had its first inception in the motion to dismiss an appeal taken by petitioner from a final judgment of the trial court to the Appellate Division of the Superior Court of New Jersey upon the grounds that the appeal was not taken within the time required. There was no Federal question raised at that time. The entire argument was based upon construction of the New Jersey Constitution, Rules of Court and the statute quoted. The Opinion in the Appellate Division on the motion to dismiss the appeal (R. 18–21) was grounded upon the fact that the rule (R. 1:2–5(b); 4:2–5) of the court providing the time within which to take an appeal superseded the prior statute (R. S. 2:27–356). Nor did the petitioner raise any Federal question when he appealed to the Supreme Court of New Jersey from the judgment of the Appellate Division dismissing his appeal from the trial court as not being taken in time. In order to confer jurisdiction upon this Court, it is essential that the petitioner have raised a Federal question in the State Courts and that the State Court must have passed upon the Federal question in its decision.

An examination of the opinion of the Appellate Division (R. 18–21) and the opinion of the Supreme Court (R. 23–46) shows that no Federal question was raised or passed upon by either of the Appellate Courts of the State of New Jersey.

Cleveland, etc., R. Co. vs. *Cleveland,* 235 U. S. 50, 35 S. Ct. 21.
Speed vs. *McCarthy,* 181 U. S. 269, 21 S. Ct. 613.
Sweringer vs. *City of St. Louis,* 185 U. S. 38, 22 S. Ct. 569.
Fowler vs. *Lamson,* 164 U. S. 252, 17 S. Ct. 112.
Honeyman vs. *Hanan,* 300 U. S. 14, 57 S. Ct. 350.
Northwestern Bell Telephone Co. vs. *Nebraska State Ry. Commission,* 297 U. S. 471, 56 S. Ct. 536.
Montgomery vs. *Hernandez,* 12 Wheat. 129, 6 L. ed. 575.
Crowell vs. *Randell,* 10 Pet. 368, 9 L. ed. 458.
Detroit City R. Co. vs. *Guthard,* 114 U. S. 133, 5 S. Ct. 811.
Israel vs. *Arthur,* 152 U. S. 355, 14 S. Ct. 583.

The Federal questions now raised on this petition were neither presented to nor formed a part of the decisions of the State Court and accordingly this Court does not have jurisdiction to grant the writ.

POINT II.

Federal questions may not be raised for the first time in a petition for a writ of certiorari to this Court.

One of the jurisdictional requirements on a petition for writ of certiorari to this Court is that the Federal questions raised in such petition must have been first presented to the State Court and decided by such court.

Murdock vs. *Memphis,* 20 Wall. 590, 22 L. Ed. 429;
Mutual Life Ins. vs. *McGrew,* 188 U. S. 291, 23 S. Ct. 375;
Rogers vs. *Clark Iron Co.,* 217 U. S. 589, 30 S. Ct. 693;
Johnson vs. *N. Y. Life Ins. Co.,* 187 U. S. 491, 23 S. Ct. 194.

The Federal questions set forth in the petition for writ of certiorari herein were not presented to the Appellate Courts of the State of New Jersey, which were the only courts in which Federal issues could have been raised, and as a result, the petitioner has not complied with the jurisdictional requirements for the granting of a writ of certiorari by this Court.

POINT III.

A writ of certiorari should not issue in this case.

The petitioner has not been denied his right of appeal by the action of the State courts. The petitioner failed to exercise his right of appeal. He failed to file his notice of appeal within the time required by the rules of court (R. 1:2–5(b); 4:2–5). The right to appeal may be a substantive right, but the time within which an appeal may be taken is purely a question of procedure, and there is no vested right in a mode of procedure. *Backus* vs. *Fort St. Union Depot Co.*, 169 U. S. 557, 18 S. Ct. 445. Nor is the right of appeal essential to due process of law under the United States Constitution.

Reetz vs. *Michigan*, 188 U. S. 505, 23 S. Ct. 390;
District of Columbia vs. *Clawans*, 300 U. S. 617, 57 S. Ct. 660;
Lott vs. *Pitman*, 243 U. S. 588, 37 S. Ct. 473;
Luckenbach S. S. Co. vs. *United States*, 272 U. S. 533, 47 S. Ct. 186;
Baltimore & Potomac R. R. Co. vs. *Grant*, 98 U. S. 398, 25 L. Ed. 231.

A decision of a State Court resting on grounds of State procedure does not present a Federal question. Matters affecting the remedy are governed by the law of the forum.

Although the petitioner's claim, that he was uncertain as to the proper procedure for him to follow in perfecting his appeal, may be a ground upon which he could petition the State Court for another chance, it is not a ground for jurisdiction in this Court as a denial of constitutional rights. *Market St. Ry. Co.* vs. *Railroad Commission of State of Cal.*, 324 U. S. 548, 65 S. Ct. 770; *Central Vermont R. Co.* vs. *White*, 238 U. S. 507, 35 S. Ct. 865; *French* vs. *Hopkins*, 124 U. S. 524, 8 S. Ct. 589; *Seneca Nation* vs. *Christy*, 162 U. S. 283, 16 S. Ct. 828.

The only question for determination in the Appellate Courts of New Jersey was whether the Rules of Court (R. 1:2–5(b); 4:2–5) respecting time to appeal superseded the statute (R. S. 2:27–356). This was purely a question of construction under the Constitution of 1947 of New Jersey and as a result does not involve a Federal issue. *Grand Gulf R., etc. Co.* vs. *Marshall*, 12 How. 165, 13 L. Ed. 938; *Snell* vs. *Chicago*, 152 U. S. 191, 14 S. Ct. 489; *Ferry* vs. *King County*, 141 U. S. 668; 12 S. Ct. 128.

Petitioner claims that the Rule of Court (R. 1:2–5) was never construed (Petition pages 2–3). As a matter of fact, the applicability of this rule specifying the time within which appeals must be taken was passed upon by the Supreme Court of New Jersey six months before the petitioner herein took his first appeal to the Appellate Division of the Superior Court. *In the Matter of the Estate of Horton*, 1 N. J. 571, 65 Atl. (2) 60 (Decided Jan. 24, 1949), Petition for writ of certiorari to U. S. Supreme Court denied June 20, 1949; in *Gay* vs. *Fidelity Union Trust Co.*, 337 U. S. 945, 69 S. Ct. 1502; Rehearing denied 338 U. S. 842, 70 S. Ct. 30; a notice of appeal from a judgment entered October 13, 1948, was filed December 3, 1948. A motion was made to dismiss the appeal on the ground that it was not taken within time. The Supreme Court of New Jersey held that Rule 1:2–5 required the appeal to be taken within 45

days after the entry of the judgment appealed from and dismissed the appeal.

This case decided that the Rules of Court were applicable to appeals and as a result there is no substantial basis for the contention of petitioner that he was denied due process because he did not know the appeal should have been taken within 45 days of the entry of judgment. It is also interesting to note in this regard that his notice of appeal in the instant case was served and filed within 45 days of the entry of the order directing that the judgment should be without costs. This is no mere coincidence but appears rather to refute the contention that he was not aware he should have appealed within 45 days.

The contention made by petitioner that the proceedings violate Article IV, Section 4 of the Federal Constitution which guarantees to every State a republican form of government was not raised before the State Court. As a matter of fact, the enforcement of the constitutional guarantee of a republican form of government is for Congress and not the Courts. *Highland Farms Dairy* vs. *Agnew*, 300 U. S. 608, 57 S. Ct. 549; *Mountain Timber Co.* vs. *Washington*, 243 U. S. 219, 37 S. Ct. 260. Questions arising under this constitutional provision are political and not judicial in character and are for the consideration of Congress and not the Courts. *State of Ohio ex rel. Bryant* vs. *Akron Metropolitan Park District*, 281 U. S. 74, 50 S. Ct. 228.

The petitioner appears to contend that Article VI, Section 2, paragraph 3 of the Constitution of 1947 of New Jersey, which provides "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. * * *", so distributes the powers of government that it denies to the State of New Jersey a republican form of government. As a matter of fact, it merely places in the Judicial branch of the State Government powers which are

properly part of that branch. The distribution of power by a State among its governmental organs is commonly, if not always, a question for the State. *Highland Farms Dairy* vs. *Agnew*, 300 U. S. 608, 57 S. Ct. 549.

The respondent contends that there is no substance to the questions raised in the petition herein and that he has not been denied due process of law, he has not been denied his right to appeal, nor has the State of New Jersey been denied a republican form of government as claimed in his petition.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

Supreme Court of the United States

October Term, 1950

No. 320

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY,

Respondent.

REPLY BRIEF FOR PETITIONER

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Replying to respondent's brief in opposition to petition for writ of certiorari, petitioner urges:

I, II

This Court Has Jurisdiction.

Under the Act of June 25, 1948, c. 646, this Court has jurisdiction. A federal question was raised in the complaint (R. 1) and dismissal of his appeal has prevented petitioner's constitutional claim from being passed upon. Moreover, the state court of last resort necessarily passed upon denial of republican form of government, which appears in the concurring opinion below discussing violation of the constitutional scheme of governmental checks and balances and lack of any check upon the state court (R. 43-46).

It is sufficient if the federal question be raised at the earliest opportunity. *Saunders* v. *Shaw,* 244 U. S. 317, 320 (1917); *Ohio* v. *Akron Park District,* 281 U. S. 74, 79 (1930). This Court can consider questions raised at any time under the doctrine of *Hormel* v. *Helvering,* 312 U. S. 552, 556-557. We think the federal questions were raised in time to be considered here.

III

Certiorari Should Issue.

Matter of Horton (Rb11) concerns appeal from an intermediate court of appeal to the court of last resort, not an appeal from a trial court as this one. The opinion does not pass upon the point raised here, makes no holding of judicial paramountcy, and does not repeal conflicting legislation. It is not helpful on the issues of the present case.

Petitioner complains, not about *distribution* of powers, but over *loss of sovereignty* by the people of New Jersey. His quarrel is not with the rule-making power, but with

the judicial holding that the court is above the legislature and beyond the people's will on the subject of court rules of practice and procedure.

Generalized rules of law are not always satisfactory, for there are exceptions to all rules. In constitutional law generalizations are dangerous, for the past cannot always rule the present. A hard-and-fast rule of constitutional law, developed out of situations radically different from a present one, will not cover this case if 5 million people are not to lose the republic they set up less than 3 years ago.

There are cases in which the Congress alone can act, but this case is not one of them. It concerns this Court, not the federal legislature.

The present case does not concern two rival state governments, with the Congress alone capable of deciding which to recognize as the lawful government of a state and alone capable of deciding which set of senators to seat with this Court powerless to control the congressional decision, as in *Luther* v. *Borden*, 48 U. S. 1 (1849). Nor is there any necessity here for the Court to destroy one state and erect a new one, without power to influence the Congress in recognizing such new state, as in *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118 (1912). This case concerns the right of a people to be and remain sovereign by means of the ballot, a right they have lost by judicial decision in New Jersey. The controversy does not touch upon any of the congressional prerogatives, as we see it.

How could the Congress act in this case? Certainly not by refusing to seat New Jersey's senators and representatives, for the trouble does not lie in their selection. What could the President do? There is no monarchy, dictatorship, or adverse government to oust. To act at all, president and congress would have to direct recall of the decision in this case and this the political branch of the federal government has no power to do. Only this Court can order recall of a judicial decision. If the federal guaranty of a

republican form of government is to be kept this Court must keep it, for it alone possesses the power to restore their lost sovereignty to our people.

The powers assumed by the state court are novel. For the first time in the long history of the United States of America (so far as we can ascertain) a state court of last resort has asserted a power to control life, liberty and property under court-made rules adopted and *retained* without regard for the people's will. No people can be sovereign in such a situation, but must be governed in large measure by the judiciary without consent, and to such extent be denied a republican form of government. Other states may follow the example.

Decision of this case in favor of the people of New Jersey would not destroy their state, but would restore it. No new state would be created by this Court and there would be no new government for the Congress to recognize. The state and its government would continue, but the rule-making power of the judicial branch of the state government would be subordinated to the people's will as expressed by their elected legislature. That the state court will usually make and retain good rules is not the point, for the same court can make bad rules and the people can do nothing about it under the present ruling. Such an unrestrained judicial power is incompatible with a republican form of government.

The right of a court to decide cases free of the people's will is not at issue here. The court has that right. What is at issue in this case is an unlimited judicial power to make adjective law wholesale without popular check upon the use of such a novel, extraordinary power the exercise of which cuts deeply into the every-day life of a people.

This case is *sui generis*. The question posed is judicial, not political, and this Court should decide it. Neither Congress nor the President can do so.

FRANK G. SCHLOSSER,
Counsel for Petitioner.